AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

ARBA No.8 of 2019

- Chief Executive Officer Naya Raipur Development Authority, Gate No. 2, Dks Bhawan, Mantralaya, Naya Raipur Chhattisgarh., District : Raipur, Chhattisgarh

---- Appellant

Versus

- M/s Jitf Water Infrastructure Ltd. Jindal Itf Centre, 28-Shivaji Marg, New Delhi, 110015, District : New Delhi, Delhi

---- Respondent

For Appellant :
Shri Kishore Bhaduri with Shri Pankaj Singh and Shri Sunny Agrawal, Advocates
For Respondent/s:
Shri Pawan Upadhyay and Shri Apoorv Mishra with Shri Ankit Pandey and Shri Aman Yadav, Advocates

---

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor

CAV Order

Per Manindra Mohan Shrivastava, J.

23/09/2020

1. This appeal is directed against order dated 13-12-2018 passed by the Commercial Court (District Level) Raipur, whereby the Commercial Court repelled challenge to award dated 20-12-2017 passed by the Sole Arbitrator, awarding amount to the tune of Rs.7,03,33,247/- (Seven Crore Three Lakh Thirty Three Thousand Two Hundred and Forty Seven), (Rs.5,50,00,000/- + Interest thereon @ 14.05% plus 2% per annum) in favour of the respondent M/s JITF Water Infra Limited, Naya Raipur.

2. The appellant herein is Naya Raipur Development Authority (For short "NRDA"), a Special Area Development Authority, being Nodal Agency of State

of Chhattisgarh, who invited a request for proposal (RFP) vide notice dated 06-06-2008. The notice comprised of Detailed Project Report (DPR), bid documents and Draft Concession Agreement to design, finance, built, operate, manage and maintain the work of development of water supply system in Naya Raipur, Chhattisgarh.

The respondent had also submitted a bid and after scrutiny, all the bid followed by the series of discussions, finally it was accepted and the respondent was declared selected bidder followed by the Letter of Acceptance dated 12-08-2009. The parties thereafter entered into an agreement on 05-11-2009 and work order was also issued on 05-11-2009. During the course of finalization of project work and all other necessities towards the process of work, though number of discussions, deliberations and correspondences were held, a dispute arose with regard to scope of concessionaire. When a review meetingwas held between the parties from 22-05-2012 to 24-05-2012, the respondent claimed that the construction of staff quarters are not within the scope of work awarded to it and it was not mentioned in the Concessionaire Agreement. According to the appellant,in the agreement executed between the parties, work of construction of staff quarter was very much included in the scope of work of development of water supply system and this led to dispute between the parties. As dispute existed, despite insistence of the appellant-Naya Raipur Development Authority, the respondent did not undertake the work of construction of staff quarters. Payment to the tune of Rs.5,50,00,000/- was withheld by the appellant. All attempts to resolve the dispute by both the parties having failed, the arbitration clause under the agreement was invoked and dispute was referred to the Sole Arbitrator in accordance with the arbitration clause. The respondent raised claim before the Arbitrator stating that he was entitled to payment of withheld amount along with interest totaling Rs.7,03,33,247/-. The claim also included cost of the arbitration.

The arbitrator allowed both the parties to lead evidence and after considering the respective submissions, the Sole Arbitrator accepted the claim on 20-12-2017 of the non-applicant and passed the award in his favour.

3. Feeling aggrieved and dissatisfied by the award passed by the Arbitratorr, the appellant-NRDA challenged the same by moving an application under Section 34 of the Arbitration and Re-conciliation Act, 1996, (For short "the Act of 1996"). The Commercial Court, however, dismissed the application holding that the interference with the award was outside the permissible scope of interference as provided under Section 34 of the Act of 1996, as the award did not suffer from any patent illegality or any grounds made out warranting interference against award. This led to filing of instant appeal.

4. Learned counsel for the appellant argued in extenso, referred to the terms and conditions of the concession agreement, Project Information Memorandum (PIM), Project Development Plan (PDP), large number of communications made between the parties, the minutes of Pre-bid meeting, review meeting, to submit that right from the beginning ,not only the documents forming integral part of Concession Agreement specifically included construction of staff quarters as scope of award, but it was so understood in that sense and interpretation by the non-applicant as in the Detailed Project Development Plan was submitted by the respondent themselves, construction of staff quarters was clearly mentioned. He referred to Request for proposal, Concessionaire Agreement and Detailed Project Report submitted by the Public Health Engineering, Raipur, to the tune of Rs.239.18 Crores, the minutes of pre-bid meeting dated 11-07-

2008 containing details of various queries and concerns of prospective bidders, modification/addendum dated 10-10-2008 issued to prospective bidders that by the steps, minute details of scope of construction work was continuously discussed and deliberated. He would also refer to Revised Detailed Project Report prepared by the Public Health Engineering Department, Raipur Zone, to the tune of Rs.239.18 Crores , which was further revised to Rs.156.234 Crores on the basis of observations given by the Central Public Health & Environment Engineering Organization. Learned counsel for the appellant further referred to Revised Draft Concessionaire Agreement dated 18-03-2009, read along with the Project Information Memorandum (PIM) containing salient features of approved Detailed Project Report issued to prospective bidders. He would also refer to second and third bid meeting minutes dated 24-04-2009 and 02-05-2009 that all through said deliberations, the Contractor/non-applicant never raised any query with regard to inclusion of the work of construction of staff quarters. He then referred to presentation of technical and financial proposal dated 18-07-2009 submitted by the respondent, which clearly mentions construction of staff quarters as included within the scope of work. Learned counsel for the appellant would highlight that it was on this presentation by the respondent that he was declared as selected bidder, which was followed by issuance of Letter of Acceptance dated 12-08-2009 leading to execution of agreement dated 05-11-2009. Learned counsel for the appellant further referred to Project Development Plan submitted by the respondent on 21-01-2010, wherein the respondent itself submitted the time schedule for completion of construction of staff quarters. It is the submission that Article 1 of the agreement, Project Development Plan has been understood to mean development plan prepared by the Concessionaire for the implementation of the project. He would then refer to submission of various drawings of staff quarters to the appellant on 09-06-2010 and Letters dated 09-06-2010, 14-07-2010 and also the minutes of coordination meeting held on 10-08-2010, wherein the respondent had agreed for convertion of staff quarters on river side to inspection bungalow. In addition, reference was also made to communication dated 23-11-2010, 13-06-2011, 10-08-2011 and 01-10-2011 as also number of review meetings held on 01-07-2010, 07-07-2010, 10-08-2010, 01-12-2010, 18-12-2011 29-06-2011, 09-08-2011 and 14-02-2012 to buttress and to put forth his submission that throughout, right from the beginning, construction of staff quarter was not only specifically included in the scope of work by the respondent, it was also understood as having been included in the scope of work by the respondent, as reflected in various communications made by the respondent Technical Committee and Detailed Project Report submitted by the respondent, from the minutes of Quarterly Pre Bid and Review Meeting subsequently held and the Concessionaire Agreement dated 05-11-2009. Learned counsel for the appellant referred to letter dated 20-04-2011 sent by the respondent, wherein it is clearly mentioned that the scope of work of construction of staff quarters and Water Treatment Plant Site was always included in the Concessionaire Agreement followed by the minutes of meeting held on 25-04-2012 and 22-07-2012 that drawing plan for staff quarter and Guard House shall be submitted in 2nd of May.

5. Having extensively referred to bid document, pre-bid meetings, Project Information Manual, Detailed Project Report, Technical Presentation, Communications, Review Meetings, it is contended that all of a sudden, vide communication dated 11-06-2012, the respondent stated that the construction of staff quarter was not within the scope of agreement and it was an act of denial of obligation towards construction of staff quarters under the agreement.

The matter was referred to M. N. Dastur & Company Limited, Project Co-ordinator who clearly opined that construction of staff quarters was a clear mandate under the agreement. Learned counsel for the appellant contended that the award as well as the order passed by the Commercial Court have completely overlooked and fall short of consideration this vital documentary evidence not only with regard to inclusion of work of construction of staff quarters under the agreement, but also a clear admission of such obligation under the terms of contract by none other than the respondent. He would submit that the learned Arbitrator and commercial both failed to apply the well settled principles of business efficacy and that the interpretation of the agreement was in complete ignorance of such vital piece of evidence including clear admission of such obligations by the respondent. It is also argued that while interpreting the terms of contract, the Arbitrator failed to take into consideration the well settled legal position that if the contract refers to a document providing that the document would form part of of the contract or that all the terms and conditions of the said document shall be read or treated as the part of the contract or that the contract will be governed by the provisions of the said document, the terms and conditions of the said document shall be incorporated into the contract and the said document in entirety will be bodily lifted and incorporated into the contract. The conduct of the respondent was also not duly taken into consideration while interpreting the terms of the contract. The correspondences exchanged between the parties, particularly those, which were written by the respondent to the appellant, contained specific admission of its obligations to construct staff quarters. Therefore, it is contended that the award suffers from gross perversity, patent illegality,lack of judicial approach, completely arbitrary and whimsical. He would further argue that the manner, in which, the Arbitrator has completely ignored most material documents referred to hereinabove, renders the award completely unfair, unreasonable and classifiable as one which would shock the conscience of the Court. The award is completely opposed to public policy. In support of his submission, learned counsel for the appellant has placed reliance upon the decisions of the Hon'ble Supreme Court in the cases of ***Nabha Power Limited vs. Punjab State Power Corporation Limited***[1]***, Satya Jain vs. Anis Ahmed Rushdie***[2]***, Union of India vs. D. N. Revri & Co.***[3]***, M. R. Engineers & Contractors Private Limited vs. Som Datt Builders Limited***[4]***, McDermott International Inc vs. Burn Standard Company Limited***[5]***, Associate Builders vs. Delhi Development Authority***[6]***, ONGC Limited vs. Saw Pipes Limited***[7]***, Hindustan Zinc Limited vs. Friends Coal Carbonization***[8]***, ONGC Limited vs. Western Geco Limited***[9] and decision of this Court in the case of ***M/s Acer India Private Limited vs. State of Chhattisgarh and others***[10].

6. Per Contra, learned counsel for the respondent, defending the award passed by the Arbitrator as also the order passed by the Commercial Court, would submit that the Arbitrator has elaborately considered the minute details, each and every document including terms of the agreement, Detailed Project Report , Project Information Memorandum, Minutes of pre-bid meeting, Review Meetings after execution of agreement, communication between the parties including many other relevant documents, particularly revised draft of Concessionaire Agreement omitting construction of staff quarters from the scope of work and also the payment schedule deliberately omitting to mention

1 (2018) 11 SCC 508
2 (2013) 8 SCC 131
3 (1976) 4 SCC 147
4 (2009) 7 SCC 696
5 (2006) 11 SCC 181
6 (2015) 3 SCC 49
7 (2003) 5 SCC 705
8 (2006) 4 SCC 445
9 (2014) 9 SCC 263
10 WP(C)No.1263/2016, decided on 05-09-2016

any schedule of payment with regard to construction of staff quarters. Learned counsel for the respondent would submit that each and every submission, which has been made before this Court, was considered not only by the Arbitrator, but also by the Commercial Court. Learned counsel for respondent would submit that when initially, Draft Concessionaire Agreement was issued by the appellant-NRDA, it contained specific clause with regard to construction of staff quarters, but when revised draft concession agreement was issued, new sub clause (d) of clause(3) did not contain terms of earlier clause (d) regarding construction of staff quarters. Thus, it is vehemently contended, clearly meant that the construction of staff quarters was conciously omitted and removed from the scope of work. He would next submit that various plans stated and presented, which include provision of staff quarters, that by itself, in the absence of inclusion in the agreement, would not become contractual obligation of the respondent under the agreement dated 05-11-2009. He would further advance his submission that no where in the agreement, it was stated that staff quarters would be also included in the scope of work. In the agreement also, project facilities do include civil work, but that does not mean that it would also necessarily include construction of staff quarters. Referring to details of water treatment facilities,it is argued that it also does not include construction of staff quarters. As far as Project Information Memorandum is concerned, referring to clause 7.1(a) thereof, it is submitted that this only incorporates standard specification and cannot be used to interpret conditions as if it also defines scope of work. Referring to clause (b) thereof, it is submitted that no where it includes construction of staff quarters though other works, large in number, have been expressly included. Referring to Project Information Memorandum, it is argued, only mentions specifications of any particular work. He would submit that reference to Detailed Project Report or Project Information Memorandum cannot be made a basis to extend the scope of work under the agreement, if the same is not included in the agreement itself. He would next submit that the provisions relating to payment mechanism also did not include staff quarters. He then refers to definition of extraction unit and also clause-1 of Schedule -3 and also Clause-2(A) that it does not contain specification of construction of staff quarters. Referring to Article 17 regarding change of scope of work under the agreement, learned counsel for the respondent would submit that though, Naya Raipur Development Authority could have added additional works and services, otherwise not included in the scope of project, it was never done. He would further contend that even when, there is no specific clause in the scope of work regarding inclusion of construction of staff quarters as part of the contractual obligation of the respondent, in view of the dispute raised in this regard by the appellant, it led the authorities to refer the matter to the Experts Committee of five persons, who also opined that the construction of staff quarters was not specifically included in the scope of work under the agreement, though they wrongly concluded that it may be treated as having been included in the scope of work, in view of the submission of plan. Further referring to construction of project facility, specified in Schedule-II of the agreement, it is contended that this also does not include construction of staff quarters. Referring to the award passed by the Arbitrator, learned counsel for the respondent would submit that the learned Arbitrator has gone into each and every relevant aspect which includes Project Information Memorandum, Detailed Project Report as well as agreement and has given its own interpretation of terms of contract. He would also submit that the Arbitrator has specifically dealt with the submissions raised on the basis of minutes of meeting and various communications and has arrived at its own finding, not only considering these material, but also the entire material placed before it to finally conclude that the construction of staff quarters was not included in the scope of work and to arrive at this, clear, specific and deliberate exclusion of work of construction of staff quarters in the revised Concession Agreement and there being no mention regarding payment mechanism towards construction of staff quarter has been taken into consideration. The Arbitrator applied principle of contra referentem that as the Naya Raipur Development Authority was author of all the document, in case of ambiguity, it would be interpreted against it. He would lastly submit that the scope of interference against the award has been limited to the grounds specifically and expressly provided in Section 34 of the Act of 1996. He would also submit that after amendment in 2015 and series of decisions of the Supreme Court, the scope of interference as explained in the case of ***Oil & Natural Gas Company Limited vs. Saw Pipes Limited and Oil & Natural Gas Company Limited vs. Western GECO International Limited,*** (supra) has been done away with. In support of his submissions, learned counsel for the respondent relied upon the decisions of Hon'ble Supreme Court in the cases of ***United India Insurance Co. Ltd. vs. Pushpalaya Printers***[11]***, G. Ramchandra Reddy and Co. vs. Union of India (UOI) and Ors.***[12]***,Steel Authority of India Ltd. vs. Gupta Brother Steel Tubes Ltd.***[13]***, P. R. Shah, Shares and Stock Broker (P) Ltd. vs. B.H.H. Securities (P) Ltd. and Ors.***[14]***, Mahanagar Telephone Nigam Limited vs. Fujitshu India Private Limited***[15]***,Sutlej Construction Limited vs. Union Territory of Chandigarh***[16]***, Madhya Pradesh Power Generation Company Limited and another vs. Ansaldo Energia Spa and Another, NHAI vs. BSC-RBM-PATI Joint Venture***[17]***, State Trading Corporation of India vs. Helm Dungemittel Gmbh and Ors.***[18]***and***

11 (2004) 3 SCC 694
12 (2009) 6 SCC 414
13 (2009) 10 SCC 63
14 (2012) 1 SCC 594
15 (2015) 2 ARBLR 332 (Delhi)
16 (2018) 1 SCC 718
17 (2018) 1 ARBLR 570(Delhi)
18 (2018) 4 ARBLR-1 (Delhi)

Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)[19].

7. Before adverting to the award, which was challenged by the appellant by filing an application under Section 34 of the Act of 1996, it is necessary to state the legal position with regard to scope of interference by the Courts against an award passed by the Arbitrator chosen by the party, in the light of statutory scheme engrafted under the Act of 1996.

It needs no authority to state the well settled legal position that while entertaining challenge to the legality and validity of award passed by the Arbitrator, the Court entertaining application under Section 34 of the Act of 1996 does not act as a Court of appeal much less Court of appeal on facts. The scope of interference against an award is expressely limited by the provisions contained under the Act of 1996. The approach of the Court would not be to undertake an independent assessment of the oral or documentary evidence led by the parties to dispute before the Arbitrator, to arrive its own independent conclusion and finding on facts. The law is setteled that while entertainig an application under Section 34 of the Act of 1996, the Court is required to see whether the award suffers from those defects which have been specifically enumerated as ground of challenge to award. The grounds, on which, the award can be challenged have been exhaustively enumerated in Section 34 itself. If any of such grounds or more than one grounds are made out, it would be permissible for the Court to interfere with the award. However, in a case where none of the grounds as mentioned in Section 34 are made out, then the hands of the Court are tied and no interference against the award would be permissible, even if there is an error of fact or even mere error of law.

19 (2019) 3 ARBLR-152 (SC)

8. In one of the recent decisions in the case of ***Associate Builders vs. Delhi Development Authority*** (supra)***,*** the legislative scheme engrafted under Section 34 of the Act of 1996 was examined by the Hon'ble Supreme Court and the grounds, on which, interference against the award would be permissible in the Court of law were considered. Examining the scope and extent of Section 34 sub section (2)(a) of the Act of 1996, as it stood prior to amendment, it was observed thus:-

> 17. "It will be seen that none of the grounds contained in sub-section(2)(a) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances."

However, the provisions contained in Section 34 of the Act of 1996 underwent amendment and radical changes were made by the Arbitration and Conciliation (Amendment) Act of 2015 (For short 'the amendment Act of 2015"), with effect from 23-10-2015.

9. As far as applicability of the amended provisions is concerned, in the case of ***Ssangyong Engineering & Construction Co. Ltd.***(supra), it was held that Section 34, as amended, will apply only to Section 34 applications, that have been made to the Court on or after 23-10-2015. Since in the present case, application under Section 34 of the Act of 1996 was filed before the Commercial Court after 23-10-2005, while examining the correctness, legality and validity of the award, the scope of interference as mandated vide Amendment Act of 2015 will have to be kept in view.

To begin with, the effect and impact of the Amendment Act of 2015, was considered by the Hon'ble Supreme Court, in a recent decision in the case of ***Ssangyong Engineering & Construction Co. Ltd.*** (supra), clarifying that the extension of "Public policy of India" in Oil & Natural Gas Company Limited vs. Saw Pipes Limited and Oil & Natural Gas Company Limited vs. Western GECO International Limited, (supra), has been done away with and a new ground of "Patent illegality" with exception, has been introduced. The development of law, effect of Amendment act of 2015 and the permissible grounds of challenge as also what is impermissible for the Courts while entertaining challenge to an award was interpreted and stated as below:-

> 23. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).
>
> 24. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.
>
> 25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.
>
> 26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law",

namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes HYPERLINK "https://indiankanoon.org/doc/1210757/"Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

29. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under HYPERLINK "https://indiankanoon.org/doc/1210757/"Section 34(2A).

30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of Associate Builders (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse."

10. In one of its earlier decision in the case of ***P. R. Shah, Shares and Stock Broker (P) Ltd.*** (supra), , no case of interference against award was made out, irrespective of whether or not, the view taken by the Arbitrator is totally correct view.

11. In the case of ***P. R. Shah, Shares and Stock Broker (P) Ltd.*** (supra), it was held:-

14. "A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in section 34(2) of the Act. The arbitral

tribunal has examined the facts and held that both second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye Law 248, in a claim against a non- member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

12. In yet another judgment in the case of ***Sutlej Construction Limited*** (supra), it was observed, as below:-

> 11. "It has been opined by this Court that when it comes to setting aside of an award under the public policy ground, it would mean that the award should shock the conscience of the court and would not include what the court thinks is unjust on the facts of the case seeking to substitute its view for that of the arbitrator to do what it considers to be "justice." (Associate Builders v. Delhi Development Authority1)
>
> 12. The approach adopted by the learned Additional District Judge, Chandigarh was, thus, correct in not getting into the act of re-appreciating the evidence as 1 (2015) 3 SCC 49 the first appellate court from a trial court decree. An arbitrator is a chosen Judge by the parties and it is on limited parameters can the award be interfered with. (Sudarsan Trading Co. v. The Government of Kerala2; Harish Chander & Co. v. State of U.P.3 and Swan Gold Mining v. Hindustan Copper Limited4)."

13. The approach of the Court undertaking exercise of re-appreciation of evidence and acting like Second Appellate Court, was deprecated, as below:-

> 13. "The learned single Judge ought to have restrained himself from getting into the meanderings of evidence appreciation and acting like a second appellate court. In fact, even in second appeals, only questions

of law are to be determined while the first appellate court is the final court on facts. In the present case the learned single Judge has, thus, acted in the first appeal against objections dismissed as if it was the first appellate court against a decree passed by the trial court."

14. The settled legal position that if there are two possible view, interpretation of the terms of the contract, interpretation of the Arbitrator has to be accepted and the Court under Section 34 cannot substitute its opinion over the Arbitrator's view, was re-stated in the case of ***Madhya Pradesh Power Generation Company Limited and another*** (supra), as below:-

25. The limit of exercise of power by Courts under Section 34 of the Act has been comprehensively dealt with by Justice R.F. Nariman in the case of Associate Builders v. Delhi Development Authority5. Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the Arbitrator. The restrictions placed on the exercise of power of a Court under Section 34 of the Act have been analyzed and enumerated in Associated Builders (supra) which are as follows:

(a) The Court under Section 34(2) of the Act, does not act as a Court of appeal while applying the ground of "public policy" to an arbitral award and consequently errors of fact cannot be corrected.

(b) A possible view by the arbitrator on facts has necessarily to pass muster as the Arbitrator is the sole judge of the quantity and quality of the evidence.

(c) Insufficiency of evidence cannot be a ground for interference by the Court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34 (2) of the Act.

(d) An award can be set aside only if it shocks the conscience of the Court.

(e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a Court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the Court. Error of construction is within the jurisdiction of the Arbitrator. Hence, no interference is warranted.

(f) If there are two possible interpretations of the terms of the contract, the arbitrator's interpretation has to be accepted and the Court under Section 34 cannot substitute its opinion over the Arbitrator's view.

15. Keeping in forefront the limited scope of interference by this Court, in view of the provision contained under Section 34 of the Act of 1996 and the principles stated and re-stated by the Hon'ble Supreme Court in aforementioned decisions, we undertake the scrutiny of the award challenged by the appellant.

16. Learned counsel for the parties have referred to large number of documents and the entire case of both the parties is based on these documents which includes terms and conditions contained in the bid documents - Detailed Project Report and Project Information Memorandum, Drawings, Report of Central Public Health & Environment Engineering Organization, the comments of the Expert Committee of five experts, revised Draft Concession Agreement, Agreement between the parties, terms of payment, advise, minutes of pre-bid meeting, post agreement, review meeting, number of communications exchanged between the parties.

According to the appellant, the documents, which have been filed by the respondents. include construction of staff quarters, and included within the scope of work and for this purpose, various clauses of Project Information Memorandum, big documents, draft Concessionaire Agreement, have been referred to. According to the appellant, when the respondent-Contractor submitted Detailed Project Report, he himself mentioned regarding the construction of staff quarters. It has been the case of the appellant that in the drawings, which was submitted by the appellant, apart from giving other technical details, drawings of Water Treatment Facilities, design of Staff quarters, was also submitted, which according to the appellant, clearly shows that the respondent always understood the agreement including construction of staff quarters within the scope of work. The minutes of pre-bid meeting, post agreement and minutes of Review Meeting were also referred to by submitting that at no point of time, the respondent, ever, raised any query with regard to inclusion of construction of staff quarters. Large number of communications made between the parties were also referred to advance the submission that the text and tenor of these documents would also show that the respondent had undertaken the obligations of construction of staff quarters and therefore, this conduct also supports the case of the appellant that the scope of work included within it, construction of staff quarter as well.

17. As against this, one of the foremost submission of the respondent is that though, initially when document of Draft Concessionaire Agreement was published, a specific clause including construction of staff quarters was available, when it was revised, that particular clause relating to construction of staff quarters was omitted. According to the respondent, the agreement executed between the parties, per se, does not contain any specific clause including construction of staff quarters within the scope of work. Referring to payment schedule also, it has been advanced from the respondent side that the payment schedule no where refers to payment regarding construction of staff quarters, all other heads of construction have been specifically referred to in the payment schedule.

It would thus appear that both the parties came out with respective documentary evidence on the issue as to whether or not the construction of staff quarters was included within the scope of work.

18. By the very nature of dispute, it essentially involves examination of large number of documentary evidence led by both the parties and nature of document is such that the documents, in two sets, one relied upon by the appellant and other relied upon by the respondent gives rise to two possible

views. Faced with aforesaid content and material, the arbitrator examined aforesaid contention including examination of the documents in its elaborate award running in about 42 pages. In the award, the Arbitrator has elaborately examined and scrutinized the draft concession agreement, detailed project report, Project Information Memorandum, large number of communications, drawings and designs and minutes of pre-bid meeting, the agreement and post agreement and minutes of review meetings. The Arbitrator undertook the scrutiny and examination of evidence before it , as below:-

> "From the perusal of documents submitted by both the parties, it has immerged that the undersigned has to arbitrate & decide only one dispute raised by the Applicant that the construction of Staff quarters is not within the scope of the work of the signed agreement and therefore he did not take up the construction work of the same, consequent to which, the Respondents have detained an amount of Rs.5,50,00,000/- from Applicant's dues."

Description of claims by the appellant were specifically referred to in page 6 to 13 of the Award and the submission made in that behalf in page 13 & 14 thereof.

Para wise reply of submission of claim was also taken into consideration as is reflected from award in its pages 14 to 20, followed by submission of page 20 to 25 and then rejoinder of the payment specifically reproduced in the award on pages 25 to 37.

Thereafter, the Arbitrator has taken into consideration various submissions in the light of the document submitted by the parties.

The Arbitrator considered the material on record and arrive at its conclusion, as below:-

“The Claimant referred a similar situation, in which the issue of construction of underground pump house was not existing in the scope of work as per concessionaire agreement, although it was appearing in the PIM and the Claimant expressed his inability to execute the said work. The respondent accordingly agreed to the objection of the Claimant and got the said work executed independently by a different agency. The Respondents did not submit any document to deny the above reference of the Claimant.

The Applicant reiterated the judgment delivered by the Hon'ble Supreme Court reported as 2009(5) SCC 313 and Manu/SC/0164/2004. In the said judgment, the Supreme Court has dealt with the issue of contra preferentum and held that in case of anomaly the agreement would be read against the person who drafted it. In the present case, the agreement was drafted by NRDA therefore, it needs to be read against it.

The respondent did not submit any argument contradictory to the reference of Apex Court, quoted by Applicant.

The Claimant and the Respondent had no further points regarding the claim to be discussed or any further documents to be submitted nor any more hearing was demanded by either of the two, therefore, the case was closed for Final Award.

The work in subject was awarded to M/s JITF through a Concessionaire Contract on 12/08/09 and work order issued on 05/11/2009 with a stipulated period of completion of 27 months to complete the works as described in the Signed Concessionaire Agreement in Schedule 2 “Construction of Project Facilities” and Schedule 3 “Obligations of the Concessionaire”

During the course of execution of the contract, the Claimant through his letter dated 11/06/2012 i.e. after a period of about 30 months after commencement of the work, denied the Construction of Staff Quarters on the basis of the provisions set out in the signed Concession Agreement. The Claimant stated that there was no mention of construction of Staff quarters in Schedule 2 and Schedule 3 of the signed Agreement. Moreover, the Claimant also pointed out in his correspondence that there was no payment mechanism for the said work in case the work was executed.

The Claimant has prayed to Arbitrator to order the Respondents to release the Concession amount of Rs.5,50,00,000/- withheld for not executing the work of Construction of Staff Quarters along with an interest of 16.05% of Rs.1,53,33,247/- w.e.f. 05/08/2015 (COD) on the withheld amount, totaling to Rs.7,03,33,247/-.

Whereas the Respondents have denied the claim of the Claimant on the basis that the Concessionaire Document should be read in whole along with the PIM and not between the lines and therefore, insisted that the disputed work was in the Scope of the work in Concessionaire Agreement.

The Contentions of the Claimant and the Respondents have been summarised in the foregoing pages and need no further elaboration."

19. Having undertaken the examination of submission of the claimant and respondent, the facts which emerged, were taken into consideration by the Arbitrator, as below:-

"On perusal and in depth study of the documents submitted by the Claimant and the Respondents, the following facts emerged:-

1) Review meetings were held to monitor the progress of work and in one such meeting between 22/05/2012 to 24/05/2012, the Claimant informed the Respondent that the construction of Staff Quarters is not in the Scope of work of the Concessionaire as it is nowhere mentioned in the Concessionaire Agreement (CA) and conveyed this fact to the Respondents through his letter dated 11/06/2012.

It was obvious from the documents submitted, that this delay of the Claimant of about 30 months (approximately) i.e. about 3 months from the stipulated period of completion in conveying the above information to the Respondent to indicate that the Claimant was not aware of the fact that the work of construction of Staff Quarters, provided in the original Draft Concessionaire Agreement, had been deleted ; whether by intent or by mistake, from the RDCA and the Signed Agreement.

2) Had the above fact been known to the Claimant right in the beginning of signing of the Agreement and the commencement of the work, the Claimant would not have proceeded further for submission of PDP and drawing, design of Staff Quarters as mandated in the Agreement and in various review meetings for completion of the project.

3) The Respondent also seem to have known the omission of Construction of Staff Quarters from the Signed Agreement only after denial of the Claimant to proceed with the said work. But, the Respondent consistently maintained that the Project Facilities were to be developed in accordance with PIM which is a reflection of revised DPR appraised by CPHEEO and which included Construction of Staff Quarters.

4) In the above context, when asked upon during the hearing on 10.06.2017, to present the total number of anomalies between DCA and

RDCA, the Claimant submitted a list of 85 changes and Respondents submitted 29 changes, about which, both the parties were not aware, till the reply of the query made on 10.06.2017 was submitted.

5) Similarly, when asked upon, during the hearing, to present the total number of anomalies between RDCA and the Signed Agreement, the Claimant submitted a list of 70 changes and the Respondents submitted list of 8 no. of anomalies, about with, both the parties were not aware till the submission of the information. It is a matter of surprise that the Applicant has mentioned in his Statement of claim in para(h) that "after careful scrutiny and line by line observation, it can be found out that the Concession Agreement signed by both the parties is completely in line with the RDCA issued by the Respondent on 18/03/2009". This shows that the Applicant had not actually compared the drafts of RDCA and Signed Agreement before entering into the contract.

6) The above fact of difference in the contents of the RDCA and Signed Agreement is completely against the ethics of any tendering process and shows lack of alertness on the part of NRDA, while preparing the important documents.

7) On perusal of PIM, supplied with RDCA to all Prospective Bidders on 18/03/2009, it was observed that in the Para 1 "General", it is stated that (quote)

"The purpose of the this PIM is to provide parties with information that may be useful to them in preparing their financial offers pursuant to the RFP (the "Bid"). This PIM includes statements, which reflect various assumptions and assessments arrived at by the Authority in relation to the Project. Such assumptions, assessment, sand statements do not purport to contain all the information the Bidder may require. This PIM may not be appropriate for all the persons, and it is not possible for the Authority, its employees or advisers to consider the investment objectives, financial situation and particular needs of each party who reads this or uses this PIM. The assumptions, assessments, statements and information contained in the PIM may not be complete, accurate, adequate or correct. Each Bidder should, therefore, conduct its own investigations and analysis and should check the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments, statements and information contained in the PIM and obtain independent advice from appropriate sources. The Authority, its employees and advisers make no representation or warranty and shall have no liability to any person including any Applicant or Bidder under any law, statue, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, costs or expenses which may arise from or be incurred or suffered on account of anything contained in this PIM or otherwise, including the accuracy, adequacy, correctness, completeness, or reliability of the PIM and any assessment, assumption, statement or information contained therein or deemed to form the part of this PIM or arising in any way in the Bid stage. (unquote)

The above description of the PIM has made it undependable, therefore, the argument that the Project Facilities were to be developed in accordance with PIM, which included Construction of Staff Quarter, is not acceptable.

8) The Schedule 2 of the Signed Agreement "Construction of Project Facilities" Part "A" and Part "B" wherein there is a mention of designing and construction in accordance with the provisions of PIM. But this mention is only

applicable to the Scope of work in the signed Agreement.

9) The Respondents have argued that Construction of Staff quarters is appearing in the PIM and DPR and therefore, it is in the part of the Scope of Work in the Agreement and hence denied the claim of the Applicant. But the Respondents have failed to establish their argument by not submitting any reference in Contract Agreement. The “Project Information Memorandum” (PIM) and “Detailed Project Report” (DPR) cannot be treated as a part of the agreement as both the parties have not signed on the documents to make it legally enforceable on either of them.

10) In the Schedule 3 “Obligation of Concessionaire”, it is observed that the provision of Construction of Staff Quarters which was mentioned in para 'd' of the original DCA, has not appeared in the RDCA after appraisal from CPHEEO and supplied to all Bidders on 18-03-2017. The respondents when queried about this para, could not submit any valid reasons for the non-existence of the provision.

11) As put on records, there was a similar type of case wherein the NRDA had asked the Concessionaire to carry out the work of Construction of Underground Pump House which was provided in the PIM, but the argument of the Concessionaire for denial of the same on the grounds that it was not mentioned as a part of the Scope of work in the Signed Agreement, was accepted by the NRDA. The work was then got executed through another Agency by them. This dual approach in deciding similar issue in the same agreement is against natural justice.

12) There exists no Clause in the Signed Agreement, under which the assistance of any amount to the Concessionaire can be withheld, therefore, the action taken by the Respondents to withheld Rs.5,50,00,000/- is unjustified and is unlawful.

13) In any system of contractual work/Business the basic and most important document is an “Agreement “. The definition of the agreement as read out in “Business dictionary” is as follows:-

> “A negotiated and usually legally enforceable understanding between two or more legally competent parties. Although, a binding contract can (and often does) result from an agreement, agreement typically documents the give-and-take of a negotiated settlement and a contract specifies the minimum acceptable standard of performance.”

14) The Respondents have also mentioned in their reply to claim that the Concession Agreement is a lump sum contract and has to be read in totality instead of reading between the lines of clauses of Agreement which doesn't depict the actual scope of work.

The definition of Lump Sum contract as per “Business Dictionary” is as below:

> “ A contract under which a principal (customer or owner) agrees to pay a contractor a specified amount for completing work without requiring a cost breakdown.”

> The concept of Concessionaire Agreement is totally different from the agreements of other forms of tenders invited for measurable construction activities and where the contract is awarded for a value of the task/work to be executed by any agency. In the Concessionaire Agreement, the

contract is awarded to an agency to develop a certain kind of facility with an initial financial assistance provided by the owner without measuring the task completed by that agency. In such case, the burden of the total financial investment to develop that facility on BOT basis lines with the developer. During the COD of the developed facility the Owner pays the remuneration of certain amount to the agency. As such the above argument of comparing Concessionaire Agreement with the Agreement of Lumpsum contract given by the Respondent is not acceptable.

15) The Claimant considers the non-existence of Construction of Staff quarters in the RDCA and the Signed Agreement as a mistake or error because the contents of clause 3(d) in the original DCA which covered the above work, but is not found in the RDCA and the Signed Agreement. The Claimant has argued during the hearing on dated 20-08-2017 that all the drafts of the contract documents have been prepared by the Respondent, therefore, the responsibility of correctness of the draft of the contract documents lies with the Respondents. In this context, the Claimant has quoted the judgment delivered by the Hon'ble Supreme Court reported as 2009(5)SCC 313 and Manu/SC/0164/2004, whose relevant extract is reproduced below:-

A) CASE NO.2009(5) SCC 313 PARA 32

"The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under Pension Regulations, 1995, and therefore, they bear the risk of lack of clarity, if any. It is a well known principle of construction of contract that if the terms applied by one party are unclear, an interpretation against that party is preferred."{VerbaChariarumFortiusAccipiuntur Centre Proferenium}

B) Manu/SC/0164/2004, Part of para 6

"It is also settled position in law that if there is any ambiguity or a term is capable of two possible interpretations one beneficial to the insured should be accepted consistent with the purpose for which the policy is taken, namely, to cover the risk on the happening of certain event. Although, there is no ambiguity in the expression "impact", even otherwise applying the rule of contra proferentem, the use of the word "impact" in Clause 5 in the instant policy must be construed against the appellant. Where the words of a document are ambiguous, they shall be construed against the party who prepared the document. This rule applies to contracts of insurance and Clause 5 of the insurance policy even after reading the entire policy in the present case should be construed against the insurer. A Constitution Bench of this Court in *General Assurance Society Ltd. v. Chandumuli Jain and Anr. MANU/SC/0180/1966 : (1966)3 SCR500* has expressed that "in a contract of insurance, there is requirement of uberrima fides, i.e. good faith on the part of the assured and the contract is likely to be construed contra proferentem i.e. against the company in case of ambiguity or doubt."

In the subject matter also NRDA has committed error while preparing the Revised Concession Agreement in which the provision of Construction of Staff Quarter has been omitted whereas it was clearly mentioned, without any ambiguity, in the original Draft Concession Agreement supplied with the RFP.

> The Respondents could not render any convincing explanation, when questioned about the reason for omission of the provision of Construction of Staff quarter in the Revised Draft Concession Agreement.

20. From aforesaid elaborate considerations and findings recorded by the Arbitrator, it is more than clear that the Arbitrator has taken into consideration the documents filed by both the parties and relying mainly on subsequent exclusion of construction of staff quarters from the draft concessionaire agreement, absence of any such specific clause in the agreement dated 05-11-2009 executed between the parties, absence of payment mechanism for payment towards construction of staff quarters, it preferred to accept the version of the respondent-claimant rather than the statement of the appellant that the scope of work did not include construction of staff quarters also. Finding recorded by the Arbitrator, by no stretch of imagination, can be said to be perverse on the ground that they are not based on any material on record. There is no patent illegality in the award. The arguments of learned counsel for the appellant ,at the most, would only lead to another possible view. That can not be made a basis to interfere with the award, unless the grounds enumerated in Section 34 of the Act of 1996 are made out. We find that the Arbitrator offered both the parties sufficient opportunity of hearing. Learned counsel for the appellant could not satisfy us that while undertaking the scrutiny of evidence led by the appellant, the Arbitrator completely omitted to take into consideration any clinching evidence which could have led Arbitrator to accept the case of the appellant by rejecting the evidence led by the respondent-claimant. The award cannot be said to be unreasonable or arbitrary to shock the conscience of the Court which would render it imperative to interfere with the award.

21. Learned counsel for the appellant failed to convince this Court with

reference to various decisions cited at the bar on application of principles of business efficacy and that all the documents referred to in the agreement should be treated to be part and parcel of the contract, coupled with the conduct of the respondent-claimant himself, the award is perverse as it lacks judicial approach and is not unreasonable and thus shocks the conscience of the Court.

22. In view of the considerations as above, though, we are partly in agreement with the submission of learned counsel for the appellant that another possible view can also be taken in the case, the submission falls short of a situation, where interference with the award could be justified on the permissible grounds. Within the limited scope of interference and restraint of law not to act as Court of appeal to re-appreciate the evidence and arrive at our own independent finding, we do not consider that the appellant has been able to make out any ground of interference as delineated under Section 34 of the Act of 1996.

23. We also record that the learned Commercial Court has also applied its mind strictly keeping in view the limited scope of interference against arbitration award and rightly restricting itself from assuming to itself ,jurisdiction of a regular Court of appeal on facts.

24. In the result, we do not find any good ground to interfere with the order passed by the Commercial Court and the award passed by the Arbitrator. The appeal, is therefore, dismissed. No costs.

SD/-	SD/-
(Manindra Mohan Shrivastava)	**(Vimla Singh Kapoor)**
Judge	**Judge**